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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1075

SUPREME COURT, U.S.
FILED
MAR 24 1972
MICHAEL RODAK, JR., CLERK

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited partnership,

Petitioners,

—against—

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ARTHUR YOUNG & COMPANY IN OPPOSITION

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This brief is submitted by respondent Arthur Young & Company in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated February 1972.

Question Presented

Do allegations that an accounting firm "caused false and improper statements and income tax returns to be prepared" for a partnership after its formation, state a claim against the accountants under the Securities Act or Securities Exchange Act for "aiding and abetting" in the prior formation of the partnership or the termination of the partnership pursuant to the terms of the partnership agreement?

Statement of the Case

The petition for certiorari herein refers only twice (pp. 9, 11) to respondent, Arthur Young & Company, a national firm of certified public accountants. Because of the nature of the charges against Arthur Young & Company, and the presentation by the other respondents as to the general factual background, we limit this statement of the case primarily to the facts relating to Arthur Young & Company.

As the opinion of the Court of Appeals below indicates (App. 1a, 6a-7a), this case involves the interpretation of an agreement of limited partnership, an apparent discrepancy between the partnership agreement and a subsequent letter, and an abundance of charges allegedly concerning fiduciary obligations. Arthur Young & Company is charged with "aiding and abetting," but the only actual factual allegations are that, after the formation of the limited partnership of Penn Associates, Arthur Young & Company "caused false and improper statements and income tax returns to be prepared and distributed showing distribution of income to the limited partners knowing they would rely thereon." (Complaint ¶21).

There is no allegation in the complaint that Arthur Young & Company participated in the formation of the partnership, sold the "securities" to the limited partners, or that Arthur Young & Company participated in any way in the termination of the partnership. (A subsequent lengthy affidavit by counsel for petitioners referred to accounting work done by Arthur Young & Company in the course of the partnership's existence.) Upon the motion to dismiss herein, the District Judge found that there was

> "no doubt that what plaintiffs are claiming is that Arthur Young & Company, in its capacity as accountant of the partnership, incorrectly handled the accounting." (App. B, 13a note)

and that the complaint was a "transparent attempt to state a federal claim against Arthur Young & Company when none in fact exists" (App. B, 14a). For this reason, as well as for the reasons expressed with respect to the claim against the general partners, the complaint was dismissed.

There Are No Considerations Warranting Review By This Court

As the opinions of the courts below point out (App. A, 6a-8a; App. B, 17a), the claims herein are essentially for rescission or reformation of the partnership agreement and a dispute as to what were the terms of the agreement of limited partnership. As such, the case presents unique but not generally important issues which would require settlement by this Court.

The charges against Arthur Young & Company of improper accounting for the partnership during its 12 year existence does not raise a federal question nor one that conflicts with applicable decisions of this Court. While *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (Nov. 8, 1971), read §10(b) of the Securities Exchange Act to bar deceptive devices in the purchase and sale of securities, this Court "agree[d] that Congress by §10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Id.* at 12. Even less did Congress intend by enacting §10(b) to regulate the accounting for expenses, income, profits, losses and distributions following formation of an enterprise.

Thus there is no conflict in the dismissal of the claim against Arthur Young & Company by the decision below with the decision in *Allico Nat'l Corp.* v. *Amalgamated Meat Cutters & Butcher Workmen*, 397 F. 2d 727 (7th Cir. 1968), nor with the decision in the *Bankers Life* case. Peti-

tioners claim, if any, is under state law, and does not require review by this Court.

Dated: New York, New York
March 22, 1972

Respectfully submitted,

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